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Attorneys for Plaintiff

FILED

09 MAY 13 PM 4:28

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HYDE & SWIGART
San Diego, California

MERCY MESIANO

Plaintiff,

ERICA L. BRACHFELD AND
LAW OFFICES OF BRACHFELD
& ASSOCIATES, PC

Case Number: /
'09 CV 1046 MMA BLM
Complaint For Damages

Jury Trial Demanded

INTRODUCTION

1. The United States Congress has found abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors, and has determined that abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy. Congress wrote the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (hereinafter “FDCPA”), to eliminate abusive debt collection practices by debt collectors,

Complaint

- 1 of 7 -

ORIGINAL

1 to insure that those debt collectors who refrain from using abusive debt
2 collection practices are not competitively disadvantaged, and to promote
3 consistent State action to protect consumers against debt collection abuses.

- 4 2. The California legislature has determined that the banking and credit system
5 and grantors of credit to consumers are dependent upon the collection of just
6 and owing debts and that unfair or deceptive collection practices undermine
7 the public confidence that is essential to the continued functioning of the
8 banking and credit system and sound extensions of credit to consumers. The
9 Legislature has further determined that there is a need to ensure that debt
10 collectors exercise this responsibility with fairness, honesty and due regard
11 for the debtor's rights and that debt collectors must be prohibited from
12 engaging in unfair or deceptive acts or practices.
- 13 3. Mercy Mesiano, (Plaintiff), through Plaintiff's attorneys, brings this action to
14 challenge the actions of Erica L. Brachfeld and the Law Offices of Brachfeld
15 & Associates, PC, ("Defendants"), with regard to attempts by Defendants to
16 unlawfully and abusively collect a debt allegedly owed by Plaintiff, and this
17 conduct caused Plaintiff damages.
- 18 4. Plaintiff makes these allegations on information and belief, with the exception
19 of those allegations that pertain to a plaintiff, or to a plaintiff's counsel, which
20 Plaintiff alleges on personal knowledge.
- 21 5. Unless otherwise stated, Plaintiff alleges that any violations by Defendants
22 were knowing and intentional, and that Defendants did not maintain
23 procedures reasonably adapted to avoid any such violation.

24 **JURISDICTION AND VENUE**

- 25 6. Jurisdiction of this Court arises pursuant to 28 U.S.C. § 1331, 15 U.S.C. §
26 1692(k), and 28 U.S.C. § 1337 for supplemental state claims.
- 27 7. This action arises out of Defendants' violations of the Fair Debt Collection
28 Practices Act, 15 U.S.C. §§ 1692 et seq. ("FDCPA") and the Rosenthal Fair

Debt Collection Practices Act, California Civil Code §§ 1788-1788.32 (“RFDCPA”).

8. Because Defendants do business within the State of California, personal jurisdiction is established.

9. Venue is proper pursuant to 28 U.S.C. § 1391.

PARTIES

10. Plaintiff is a natural person who resides in the State of California.

11. Defendants are located in the the State of California.

12. Plaintiff is obligated or allegedly obligated to pay a debt, and is a “consumer” as that term is defined by 15 U.S.C. § 1692a(3).

13. Defendants are persons who use an instrumentality of interstate commerce or the mails in a business the principal purpose of which is the collection of debts, or who regularly collect or attempt to collect, directly or indirectly, debts owed or due or asserted to be owed or due another and are therefore debt collectors as that phrase is defined by 15 U.S.C. § 1692a(6).

14. Plaintiff is a natural person from whom a debt collector sought to collect a consumer debt which was due and owing or alleged to be due and owing from Plaintiff, and is a “debtor” as that term is defined by California Civil Code § 1788.2(h).

15. Defendants, in the ordinary course of business, regularly, on behalf of themselves, or others, engage in debt collection as that term is defined by California Civil Code § 1788.2(b), are therefore debt collectors as that term is defined by California Civil Code § 1788.2(c).

16. This case involves money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction. As such, this action arises out of a consumer debt and “consumer credit” as those terms are defined by Cal. Civ. Code § 1788.2(f).

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FACTUAL ALLEGATIONS

17. At all times relevant to this matter, Plaintiff was an individual residing within the State of California.
 18. At all times relevant, Defendants conducted business within the State of California.
 19. Sometime before September 11, 2008, Plaintiff is alleged to have incurred certain financial obligations.
 20. These financial obligations were primarily for personal, family or household purposes and are therefore a “debt” as that term is defined by 15 U.S.C. §1692a(5).
 21. These alleged obligations were money, property, or their equivalent, which is due or owing, or alleged to be due or owing, from a natural person to another person and are therefore a “debt” as that term is defined by California Civil Code §1788.2(d), and a “consumer debt” as that term is defined by California Civil Code §1788.2(f).
 22. Sometime thereafter, but before September 11, 2008, Plaintiff allegedly fell behind in the payments allegedly owed on the alleged debt.
 23. Subsequently, but before September 11, 2008, the alleged debt was assigned, placed, or otherwise transferred, to Defendants for collection.
 24. On or about September 11, 2008, Defendants filed a lawsuit against Plaintiff in the Superior Court for the State of California in San Diego, case number 37-2008-00091462-CL-CL-CTL.
 25. Plaintiff is informed and believes, and thereon alleges that Defendants initiated this current action well outside the statute of limitations allowed by California Law.
 26. Through this conduct, Defendant was collecting an amount (including any interest, fee, charge, or expense incidental to the principal obligation) when

HYDE & SWIGART
San Diego, California

- 1 such amount was not expressly authorized by the agreement creating the debt
2 or permitted by law. Consequently, Defendant violated 15 U.S.C. § 1692f(1).
- 3 27. Plaintiff is informed and believes, and thereon alleges that the lawsuit filed by
4 defendant was initiated without any reasonable inquiry into the facts or merits
5 of the allegation. As such this action by defendant violated 15 U.S.C. §§
6 1692e, 1692e10, and 1692f.
- 7 28. Because this violated certain portions of the federal Fair Debt Collection
8 Practices Act as these portions are incorporated by reference in the Rosenthal
9 Fair Debt Collection Practices Act, though California Civil Code § 1788.17,
10 this conduct or omission violated Cal. Civ. Code § 1788.17, this conduct or
11 omission violated Cal. Civ. Code § 1788.17.

12 **CAUSES OF ACTION**

13 **COUNT I**

14 **VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT**

15 **15 U.S.C. §§ 1692 ET SEQ.**

- 16 29. Plaintiff incorporates by reference all of the above paragraphs of this
17 Complaint as though fully stated herein.
- 18 30. The foregoing acts and omissions constitute numerous and multiple violations
19 of the FDCPA, including but not limited to each and every one of the above-
20 cited provisions of the FDCPA, 15 U.S.C. § 1692 et seq.
- 21 31. As a result of each and every violation of the FDCPA, Plaintiff is entitled to
22 any actual damages pursuant to 15 U.S.C. § 1692k(a)(1); statutory damages in
23 an amount up to \$1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A); and,
24 reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1692k(a)(3) from
25 each and every defendant, jointly and severally.

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COUNT III

VIOLATIONS OF THE ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT

CAL. CIV. CODE §§ 1788-1788.32

32. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.
 33. The foregoing acts and omissions constitute numerous and multiple violations of the RFDCPA.
 34. As a result of each and every violation of the RFDCPA, Plaintiff is entitled to any actual damages pursuant to Cal. Civ. Code § 1788.30(a); statutory damages for a knowing or willful violation in the amount up to \$1,000.00 pursuant to Cal. Civ. Code § 1788.30(b); and reasonable attorney's fees and costs pursuant to Cal. Civ. Code § 1788.30(c) from each and every defendant, jointly and severally.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that judgment be entered against Defendants, and Plaintiff be awarded damages from each and every defendant, as follows:

COUNT I

FAIR DEBT COLLECTION PRACTICES ACT

15 U.S.C. §§ 1692 ET SEQ.

35. An award of actual damages pursuant to 15 U.S.C. § 1692k(a)(1);
 36. An award of statutory damages of \$1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A);
 37. An award of costs of litigation and reasonable attorney's fees, pursuant to 15 U.S.C. § 1692k(a)(3).

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COUNT III

ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT

CAL. CIV. CODE §§ 1788-1788.32

38. An award of actual damages pursuant to California Civil Code § 1788.30(a);
 39. An award of statutory damages of \$1,000.00 pursuant to Cal. Civ. Code § 1788.30(b);
 40. An award of costs of litigation and reasonable attorney's fees, pursuant to Cal. Civ. Code § 1788.30(c).

TRIAL BY JURY

41. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Date: 5/8/09

Hyde & Swigart

By: Joshua B. Swigart
Attorneys for the Plaintiff

Use JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating a civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

(a) PLAINTIFFS
Mercy Mesiano

(b) County of Residence of First Listed Plaintiff California San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Hyde & Swigart
11 Camino Del Rio South Suite 301, San Diego, CA 92108
619.233.7770

DEFENDANTS
Erica L. Brachfeld And Law Offices Of Brachfeld & Associates, PC

09 MAY 13 PM 4:27
County of Residence of First Listed Defendant California
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

BY

BEAUTY

'09 CV 1046 MMA BLM

I. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- | | |
|-----------------------------|---|
| 1 U.S. Government Plaintiff | <input checked="" type="checkbox"/> 3 Federal Question
(U.S. Government Not a Party) |
| 2 U.S. Government Defendant | <input type="checkbox"/> 4 Diversity
(Indicate Citizenship of Parties in Item III) |

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

V. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
110 Insurance	PERSONAL INJURY	PERSONAL INJURY	PROPERTY RIGHTS	400 State Reapportionment
120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 410 Antitrust
130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 430 Banks and Banking
140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	SOCIAL SECURITY	<input type="checkbox"/> 450 Commerce
150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 460 Deportation
151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 480 Consumer Credit
153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 490 Cable/Sat TV
160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 390 Other Personal Injury	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 810 Selective Service
190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 410 Voting	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 850 Securities/Commodities/ Exchange
195 Contract Product Liability		<input type="checkbox"/> 422 Employment	FEDERAL TAX SUITS	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
196 Franchise		<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input checked="" type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	Habeas Corpus:	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 891 Agricultural Acts
210 Land Condemnation	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 510 Motions to Vacate Sentence		<input type="checkbox"/> 892 Economic Stabilization Act
220 Foreclosure	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 530 General		<input type="checkbox"/> 893 Environmental Matters
230 Rent Lease & Ejectment	<input type="checkbox"/> 449 Welfare	<input type="checkbox"/> 535 Death Penalty		<input type="checkbox"/> 894 Energy Allocation Act
240 Torts to Land	<input type="checkbox"/> 450 Mandamus & Other	<input type="checkbox"/> 540 Mandamus & Other		<input type="checkbox"/> 895 Freedom of Information Act
245 Tort Product Liability	<input type="checkbox"/> 453 Civil Rights	<input type="checkbox"/> 550 Civil Rights		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
290 All Other Real Property	<input type="checkbox"/> 455 Prison Condition	<input type="checkbox"/> 555 Prison Condition		<input type="checkbox"/> 950 Constitutionality of State Statutes

VI. ORIGIN

(Place an "X" in One Box Only)

- | | | | | | | |
|---|---|--|---|--|---|--|
| <input checked="" type="checkbox"/> 1 Original Proceeding | <input type="checkbox"/> 2 Removed from State Court | <input type="checkbox"/> 3 Remanded from Appellate Court | <input type="checkbox"/> 4 Reinstated or Reopened | <input type="checkbox"/> 5 Transferred from another district (specify) | <input type="checkbox"/> 6 Multidistrict Litigation | <input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment |
|---|---|--|---|--|---|--|

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 U.S.C. § 1692 et seq.

Brief description of cause:

FDCPA

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 75,000

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE:

5/8/09

FOR OFFICE USE ONLY

RECEIPT # 776 AMOUNT 350

APPLYING IFP

JUDGE

MAG. JUDGE

ORIGINAL

Court Name: USDC California Southern
Division: 3
Receipt Number: CAS000776
Cashier ID: sramirez
Transaction Date: 05/13/2009
Payer Name: HYDE AND SWIGART

CIVIL FILING FEE
For: MESIANO V. BRACHFELD
Case/Party: D-CAS-3-09-CV-001046-001
Amount: \$350.00

CHECK
Check/Money Order Num: 3083
Amt Tendered: \$350.00

Total Due: \$350.00
Total Tendered: \$350.00
Change Amt: \$0.00

There will be a fee of \$45.00
charged for any returned check.